No. 87-5565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHERLYN CLARK,

Petitioner,

v.

GENE JETER

Respondent.

On Writ Of Certiorari To The Superior Court of Pennsylvania

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Is Pennsylvania's current eighteen-year paternity statute of limitations, which has been construed to be not applicable to cases barred by the now repealed six-year statute but pending on appeal at the time of the enactment of the new statute, in conflict with the federal Child Support Enforcement Amendments?

2. Does a six-year statute of limitations for actions brought to establish paternity in support actions for children born out of wedlock while children born to married parents can seek support throughout their minority violate the equal protection guarantee of the Fourteenth Amendment to the United States Constitution?

3. Does foreclosing a child's continuing right to paternal support after six years because of his custodian's failure to file an action on his behalf deprive the child of the due process guaranteed by the Fourteenth Amendment of the United States Constitution?

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OPINIONS BELOW

Cherlyn Clark's complaint for support for her out-of-wedlock child was dismissed by the Court of Common Pleas, Allegheny County, Pennsylvania on July 8, 1985. (JA 72) An appeal was taken to the Pennsylvania Superior Court, and the trial court's decision was affirmed by order and panel decision dated October 23, 1986, and reported at 358 Pa. Super. 550, 518 A.2d 276 (1986). (JA 73-74) Thereafter the Superior Court denied Petitioner's Application for Reargument, *per curiam*, on December 18, 1986. (JA 85) On May 27, 1987, the Pennsylvania Supreme Court denied her Petition for Allowance of Appeal, also *per curiam*, ___ Pa. ___, 527 A.2d 533 (1987). (JA 86)

JURISDICTIONAL STATEMENT

The judgment of the Superior Court of Pennsylvania affirming the judgment of the lower court dismissing Cherlyn Clark's support complaint for her minor daughter as time-barred was entered October 23, 1986. This order was rendered by the highest court in the Commonwealth of Pennsylvania in which review of such an order could be had, 42 Pa. Cons. Stat. Ann. § 742. On May 27, 1987, the Supreme Court of Pennsylvania denied Petitioner's Petition for Allowance of Appeal. Petitioner moved this Honorable Court for an Extension of Time within which to file a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 2101(c). By order dated August 14, 1987, Justice William J. Brennan, Jr. granted Petitioner's motion and extended the filing date until September 24, 1987. The Petition for a Writ of Certiorari was filed within this period. The Petition for Writ of Certiorari was granted January 11, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Section 1 of the Fourteenth Amendment to the Constitution of the United States

Article VI, Clause 2 of the Constitution of the United States

Statutory Provisions

42 U.S.C. § 666(a) and § 666(a)(5)

23 Pa. Cons. Stat. Ann. § 4343(b) (Purdon Supp. 1987)

42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1985) (repealed)

42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1982) (repealed)

42 Pa. Cons. Stat. Ann. § 6704(e) (Purdon Supp. 1980) (repealed)

42 Pa. Cons. Stat. Ann., Pa. R.Civ.P. 1910.7

42 Pa. Cons. Stat. Ann., Pa. R.Civ.P. 1910.15

(The verbatim texts of the constitutional and statutory provisions involved in this case are set forth in the Addendum to the Petitioner's Brief.)

STATEMENT OF THE CASE

On September 22, 1983, Petitioner Cherlyn Clark filed a support complaint in the Allegheny County Court of Common Pleas on behalf of her minor daughter, Tiffany Clark, who was born out of wedlock on June 11, 1973. (JA 4-6) In the complaint Cherlyn Clark alleged that Gene Jeter was the father of Tiffany. (JA 5) Blood tests were subsequently ordered by the court, (JA 7-8) and after the

tests failed to exclude Mr. Jeter as the possible father of Tiffany, a conciliation was scheduled with the court for February 16, 1984. (JA 9)

At the conciliation Mr. Jeter appeared with counsel and presented a Motion to Dismiss the Complaint and to Enter Judgment in Favor of the Defendant, in which he denied paternity and raised the six-year statute of limitations for paternity actions, 42 Pa. Cons. Stat. Ann. § 6704(e),[1] as a defense to Cherlyn Clark's action. (JA 10)

Cherlyn Clark subsequently filed an Answer to his motion and a motion of her own for judgment in her favor on the record therein. (JA 12-13) In her Answer, she asserted that the six-year statute of limitations violated her Fourteenth Amendment right to equal protection because the law permits marital children to sue for support until they are eighteen, but cuts off the rights of nonmarital children at six years. This is so because an illegitimate child must prove paternity before he can seek support, and is only permitted to commence a paternity proceeding within six years from birth or within two years after the most recent support payment, 42 Pa. Cons. Stat. Ann. § 6704(b). She also alleged a violation of due process because the illegitimate child's continuing

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[1] 42 Pa.Cons. Stat. Ann. § 6704(e) (Purdon Supp. 1980), the six-year limitations section of Pennsylvania's support proceedings law applicable to children born out of wedlock was adopted in 1978 as part of Pennsylvania's change-over from criminal to civil support actions. The section was amended in 1982 and redesignated as 42 Pa.C.S. § 6704(b) (Purdon Supp. 1985). It was replaced by an 18-year statute of limitations effective January 1986. The trial court held that Cherlyn Clark's claim was time-barred by 42 Pa.C.S. § 6704(b); however, the Superior Court referred to 42 Pa.C.S. § 6704(e) in its decision. The two sections are essentially identical except that the phrase "or proceedings" has been added to § 6704(b).

right to support is forfeited by the actions or inactions of his mother before his sixth birthday.

Ms. Clark also alleged that the blood tests performed pursuant to the court's order showed a 99.93% probability that Mr. Jeter was Tiffany's father. (JA 13) In the affidavit which accompanied this motion, she alleged that Mr. Jeter assaulted her during her pregnancy, so that out of fear of him, she delayed filing for support until 1978. (JA 14-15) In that year, she filled out what she thought was a support complaint with a Department of Public Welfare support officer but was not informed by the Welfare Department until August 1983 that she needed to take the further step herself of filing a support complaint with the Common Pleas Court. (JA 3, 6, 15-16)

After a hearing on May 5, 1985, the trial court entered an order upholding the constitutionality of 42 Pa. Cons. Stat. Ann. § 6704(b) based on the holding of the Pennsylvania Supreme Court in *Astemborski* v. *Susmarski*, 499 Pa. 99, 451 A.2d 1012 (1982), *vacated* 103 S. Ct. 3105 (1983), *reinstated on remand* 502 Pa. 409, 466 A.2d 1018 (1983). (JA 69-72) The trial court also held that any fear that Ms. Clark may have had of Mr. Jeter lasted only a few years, so that "there were at least six years after that period during which an action could have been filed." (JA 70-71) Therefore, the trial court held Ms. Clark's claim to be barred by the statute of limitations. (JA 71)

Cherlyn Clark appealed to the Superior Court of Pennsylvania, again arguing that the statute of limitations contained in 42 Pa. Cons. Stat. Ann. § 6704 offends equal protection and due process. Her brief was filed on October 29, 1985, one day before the Pennsylvania Legislature enacted 23 Pa. Cons. Stat. Ann. § 4343(b), which provided for an eighteen-year statute of limitations in actions to

establish paternity. This statute was passed in response to the new federal law, 42 U.S.C. § 666(a)(5) which mandated all states participating in the federal child support program to adopt eighteen-year statutes of limitations in paternity actions.

On March 26, 1986, oral argument was scheduled on the case. On that same day this Honorable Court announced the per curiam decision in *Paulussen* v. *Herion*, 334 Pa. Super. 585, 483 A.2d 892 (1984), *prob. juris. noted* 474 U.S. 899 (1985), *vacated* 475 U.S. 557 (1986), *on remand* 359 Pa. Super. 520, 519 A.2d 473 (1986) in which this Court declined to consider an equal protection challenge to the six-year statute of limitations contained in § 6704 until Pennsylvania courts first determined the applicability of the new eighteen-year statute.

Shortly thereafter, on April 11, 1986, Cherlyn Clark filed in the Superior Court an Application for Permission to File an Application for Remand, asking the Superior Court to return the case to the trial court for consideration of the applicability of the eighteen-year statute of limitations to her case. (R ____)

The Superior Court did not rule upon her Application for Remand until October 23, 1986, when it denied her Application without opinion and decided the case. (JA 73-84) Reluctantly, the Superior Court held the six-year statute of limitations to be constitutional under the prior decisions of the Pennsylvania Supreme Court in *Astemborski* v. *Susmarski*, 502 Pa 409, 466 A.2d 1018 (1983) and *Von Colln* v. *Pennsylvania Railroad Co.*, 367 Pa. 232, 80 A.2d 83 (1951). The Superior Court also held, however, that the new eighteen-year statute could not be applied to revive cases which would have been previously barred by the running of the six-year statute. (JA 74-84)

Thereafter, Cherlyn Clark filed a Motion for Reargument with the Superior Court in which she alleged that, in analyzing the constitutionality of § 6704, the Superior Court had failed to consider changes in the law since *Astemborski*, *supra*, and also that the court had mistakenly held the eighteen-year statute not retroactive since the federal Child Support Enforcement Amendments required each state to implement "procedures which permit the establishment of paternity of any child at any time prior to such child's eighteenth birthday." (Application for Reargument, p. 3, R 85).

An order directing Gene Jeter to file an Answer to Cherlyn Clark's Motion for Reargument was entered by the Court on November 7, 1986. The Superior Court, however, denied the Motion for Reargument without opinion on December 18, 1986. (JA 85)

Next, Cherlyn Clark filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. In it she again alleged the violation of the Fourteenth Amendment rights to due process and equal protection by the application of the six-year statute of limitations to non-marital children. She also argued that the new eighteen-year statute of limitations had to be retroactive because "Pennsylvania must comply with the federally mandated eighteen-year statute of limitations in order to receive federal monies for Pennsylvania support enforcement programs." (Petition for Allowance of Appeal by Cherlyn Clark, Statement of the Questions Presented, #1). The Pennsylvania Supreme Court denied Cherlyn Clark's Petition for Allowance of Appeal without opinion May 27, 1987.

Cherlyn Clark thereafter filed in this Court a Petition for Certiorari to the Superior Court of Pennsylvania,

which was granted by this Honorable Court on January 11, 1988.

SUMMARY OF ARGUMENT

The unanimously adopted federal Child Support Enforcement Amendments of 1984 mandated the states to implement "procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday." To conform to this statutory requirement, Pennsylvania extended its statute of limitations in paternity/support proceedings for out-of-wedlock children, from six to eighteen years.

The plain, unambiguous language of the federal Amendments and the legislative history concerning their passage unmistakably reveal that Congress intended the states to apply this provision retroactively. Thus, the lower court's conclusion that Pennsylvania's new statute of limitations will not be applied retroactively in the case at bar impermissibly contravenes the federal statute.

Alternatively, Pennsylvania's six-year statute of limitations unconstitutionally infringes upon both the equal protection and due process guarantees of the Fourteenth Amendment to the United States Constitution. By cutting off the right of a child born out-or-wedlock to seek support from the child's father six years after the child's birth, while not similarly barring the right of a child born to married parents to seek such support, 42 Pa. Cons. Stat. Ann. § 6704(b) imposes a discrimination upon out-of-wedlock children which does not bear a substantial relationship to the state's stated interest in avoiding prosecution of stale or fraudulent claims. Therefore, 42 Pa. Cons. Stat. Ann. § 6704(b) unconstitutionally denies to out-of-wedlock children the equal protection of the laws guaran-

teed by the equal protection clause of the Fourteenth Amendment.

Furthermore, although all children in Pennsylvania are entitled to receive continuous financial support from their fathers through their minorities, this right is prematurely forfeited if the child's adult custodian or the caretaker-agency fails to initiate the appropriate action within the prescribed time limitations. Because those minor children are not afforded any opportunity to assert and prosecute their own claims for paternal financial support on their own behalf before or after 42 Pa. Cons. Stat. Ann. § 6704(b) forecloses their right to support, this six-year statute of limitations violates their due process protections guaranteed by the Fourteenth Amendment.

ARGUMENT

I. THE FEDERAL CHILD SUPPORT ENFORCEMENT AMENDMENTS WHICH MANDATE THAT STATES ALLOW PATERNITY ACTIONS TO BE BROUGHT UNTIL A CHILD'S EIGHTEENTH BIRTHDAY, REQUIRE REVERSAL OF THE LOWER COURT'S JUDGMENT.

In 1984, Congress unanimously passed the Child Support Enforcement Amendments of 1984, Pub.L. 98-378, 98 Stat. 1305 (1984), codified at 42 U.S.C. §§ 651 *et seq.* These Amendments require states participating in the Program for Aid to Families of Dependent Children (AFDC), Title IV, Part A of the Social Security Act, 42 U.S.C. §§ 602-615 (1982) to adopt certain procedures to strengthen and streamline support collection efforts. It is Cherlyn Clark's contention that the eighteen-year statute of limitations mandated by the Child Support Enforcement Amendments should have been applied to her complaint. If this Court so decides, the need to determine the

substantial equal protection and due process issues raised by the six-year statute of limitations can be avoided.

The eighteen-year statute of limitations in support/paternity actions was a keystone of the federal program and each state was required to adopt it in order to share in the federal funding for its state support program:

> 42 U.S.C. § 666. *Requirement of statutorily prescribed procedures to improve the effectiveness of child support enforcement*
>
> a) Types of procedures required:
>
> In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with the regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:
>
> * * *
>
> (5) *Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.* (emphasis added)

Since the language of this provision of the Amendments is clear and unambiguous, there is no opportunity for an alternative construction. As this Court has repeatedly held:

> Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.

Park 'N Fly, Inc. v. *Dallas Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). See also, *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Thus the Amendments require that Pennsylvania permit

paternity claims of all children, including Tiffany Clark, under the age of eighteen.

Furthermore, the legislative history underscores the clear language of the statute. In his remarks upon the passage of the Child Support Enforcement Amendments, Senator Robert Dole presented the following stark statistics:

> "According to the U.S. Census Bureau, more than 8.4 million women in 1981 were raising children whose fathers were absent; 30 percent of these women and children were living in poverty. Although most of the women should receive child support payments, obligations have been established on behalf of only 4 million of them."
>
> 130 Cong. Record. S-4802, April 25, 1984

These figures were reiterated many times in the comments of other senators and representatives. The clear Congressional concern here was for the women and children who *in the past* had not received support.[2] The Amendments were passed so that *in the future* these women and children would no longer be deprived of support.[3]

The Pennsylvania Legislature enacted its eighteen-year statute of limitations, 23 Pa. Cons. Stat. Ann. § 4343(b) (Purdon Supp. 1987) while Cherlyn Clark's case

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[2] Legislation is pending which would "clarify" that the 1984 Amendments' authority to establish paternity until age 18 includes actions previously dismissed under shorter statutes of limitations. H.R. 1720, H.R. Rep. No. 100-159, 100th Cong., 1st Sess. at 72 (1987).

[3] In Pennsylvania, an order of support is effective from the date of filing the support complaint, 42 Pa. Cons. Stat. Ann., Pa. R.Civ.P. 1910.17. Therefore a child receives support only back to the date of filing the support complaint.

was pending before the Pennsylvania Superior Court. It provides:

> *Limitation of Actions.*—An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of the birth of the child.

Section 4343(b) was part of a package of support program reforms passed to bring Pennsylvania into compliance with the federal Amendments and thereby prevent Pennsylvania from losing federal reimbursement funds provided for the support programs. Pennsylvania State Senator Greenleaf read a prepared statement into the record at the time the Legislature approved the State support program amendments, including 23 Pa. Cons. Stat. Ann. § 4343(b), emphasizing that the Act had been passed for "federal money and to better provide for our families," Pennsylvania Legislature Journal-Senate, October 9, 1985, at 1099.

Nevertheless in the within case the Pennsylvania Superior Court has held that 23 Pa. Cons. Stat. Ann. § 4343(b) does not apply to cases which were previously barred by the running of the six-year statute of limitations, *Clark* v. *Jeter*, 358 Pa. Super. 550, 518 A.2d 276 (1986), *alloc. den.* 527 A.2d 533 (Pa. 1987)[4]. The Pennsylvania Superior Court has reiterated this holding in the en banc remand decision in *Paulussen* v. *Herion*, 334 Pa. Super. 585, 483

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[4] This holding was in direct conflict with previous holdings of the Superior Court which found that the six-year statute of limitations enacted at 42 Pa. Cons. Stat. Ann. § 6704 was applicable to claims which had previously been barred by the running of the two-year statute of limitations. See *Williams* v. *Wolf* 297, Pa. Super. 270, 443 A.2d 831 (1982); *Commonwealth ex rel Lucretia Johnson* v. *King*, 297 Pa. Super. 431, 444 A.2d 108 (1982); *Jennis* v. *Stillman*, 306 Pa. Super. 431, 452 A.2d 801 (1982).

A.2d 892 (1984), *prob. juris. noted* 474 U.S. 899 (1985), *vacated* 475 U.S. 557 (1986), *on remand* 359 Pa. Super. 520, 519 A.2d 473 (1986).[5]

The federal government is free to establish conditions for participation in federally funded programs, *King* v. *Smith*, 392 U.S. 309 (1968). In other cases brought under the Social Security Act this Court has held that once a state voluntarily chooses to participate in a program under that Act, the state under the Supremacy Clause must comply with the federal statutory requirements and applicable regulations, *Townsend* v. *Swank*, 404 U.S. 282 (1971); see also, *Harris* v. *McKae*, 448 U.S. 297, 301 (1980).

The plain language, accompanying regulations, and legislative history of 42 U.S.C. § 666(a)(5) require that states adopt, at minimum, *retroactive* eighteen-year statutes of limitation for paternity actions. The statutory language is clear: *any* child at *any time* until his eighteenth birthday must be able to have his paternity established.

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[5] *Paulussen*, *supra*, had been specifically remanded by this Court for the consideration of the effect of the new eighteen-year statute of limitations. While the Superior Court found the federal Act was the "motivating factor" for the state law, it mirrored the holding of *Clark* v. *Jeter*, *supra*, that Section 4343(b) does not apply to pending cases where the six-year limitations statute had already run before the longer statute was enacted. Furthermore, in *Young* v. *Hampton*, ____ A.2d ____ (No. 1195 Phila. 1987) the Pennsylvania Superior Court, citing *Clark* v. *Jeter*, *supra*, came to a similar conclusion in spite of the intervention of the Pennsylvania Department of Public Welfare, which argued that federal law required the retroactive application of the statute. (A copy of this very recent decision is attached to the Addendum to Petitioner's Brief).

The House of Representatives, in approving the Amendments, specifically stated:

> The bill provides that procedures under applicable state paternity laws must permit the establishment of an individual's paternity for any child until the child's eighteenth birthday . . . . States could eliminate statutes of limitation for establishing paternity altogether if they wished.
>
> H.R. Rep. No. 527, 98th Cong., 1st Sess. 1 (1983), at 38.

The Congressional intent to use this requirement to revive cases which might have been barred by shorter statutes in the various states was emphasized by Department of Health and Human Services (HHS) regulations implementing the Child Support Enforcement Amendments on May 9, 1985. In addressing comments that the regulations paid insufficient attention to existing state laws and procedures for the establishment of paternity, HHS took the following position:

> Since it is clear that cases previously considered closed because of the child's age will now have to be reopened and services provided, we saw no need to elaborate on this requirement. *Child Support Enforcement Program, Implementation of Child Enforcement Amendments of 1984*, 50 Fed. Reg. 90, 19608, 19631 (1985), comment to 45 C.F.R. § 302.70(a)(5).

HHS's position on this issue is entitled to substantial deference. See, e.g. *Connecticut Dept. of Income Maintenance* v. *Heckler*, 471 U.S. 524, (1985). Moreover, HHS's position is the only reasonable interpretation of the plain language of the Act and its legislative history.

Cherlyn Clark and her daughter were among the millions of women and children living without needed sup-

port in 1981 whom Congress clearly intended to help by the enactment of the Child Support Enforcement Amendments. Yet by operation of Pennsylvania law, the Amendments will do them no good. Section 4343(b) as construed by the Pennsylvania Superior Court is in direct conflict with the intent and language of the Child Support Enforcement Amendments, and thus must fall by virtue of the Supremacy Clause. The decision of the Pennsylvania Superior Court finding 23 Pa. Cons. Stat. Ann. § 4343(b) inapplicable to Cherlyn Clark's claim should be reversed.

The application of the eighteen-year statute of limitations mandated by the Child Support Enforcement Amendments of 1984 to Cherlyn Clark's case eliminates Gene Jeter's statute of limitations defense and thereby provides a statutory basis for a final resolution of this matter, thus avoiding the need to decide a constitutional question. *Crowell* v. *Benson*, 285 U.S. 22 (1932).

II. A STATUTE OF LIMITATIONS OF SIX YEARS FROM BIRTH IN AN ACTION FOR CHILD SUPPORT OF ILLEGITIMATE CHILDREN VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Pennsylvania support statute in effect when Cherlyn Clark filed a complaint for support on behalf of her ten-year old daughter, Tiffany, contained a six-year statute of limitations for paternity determinations. This provision has been consistently interpreted by the Pennsylvania Supreme Court to limit the period in which illegitimate children can initiate attempts to obtain support where paternity is contested.[6] Finding itself to be bound by

[6] *Astemborski* v. *Susmarski*, 499 Pa. 99, 451 A.2d 1012 (1982), *vacated* 462 U.S. 1127, *reinstated on remand*, 502 Pa. 409, 466 A.2d 1018 (1983); *Paulussen* v. *Herion*, 334 Pa. Super. 585, 483 A.2d 892 (1984), *prob. juris. noted* 474 U.S. 899 (1985), *vacated* 475 U.S. 557, *on remand* 359 Pa. Super. 520, 519 A.2d 473 (1986).

these holdings, the Pennsylvania Superior Court in *Clark* v. *Jeter*, 358 Pa. Super. 550, 518 A.2d 276 (1986), *alloc. den.* 527 A.2d 533 (Pa. 1987), reluctantly held that Cherlyn Clark's claim was time-barred. Legitimate children, however, are under no such constraint. Support may be sought for them during the entire period of their minority and beyond, even if their paternity is contested.[7] The question of whether this dissimilarity violates equal protection is now before this Honorable Court.

Inherent in the guarantee of equal protection of the law is the pledge to fairness and the promise that group classifications, where they exist, will be the result of rational decisions, not the mindless work of unarticulated prejudices. Because illegitimacy is beyond the individual's control and bears no relation to the individual's ability to participate in and contribute to society, and because illegitimate children have so often suffered for the conduct of their parents, this Court has through the years invalidated numerous state laws which disfavored children born out of wedlock.[8]

By these cases, it has been established that a classification based on illegitimacy is unconstitutional unless it has an evident and substantial relationship to a state interest, *United States* v. *Clark*, 445 U.S. 184, 191 (1980). Furthermore, such a classification may not "erect an impenetrable

[7] *Com ex rel. Stump* v. *Church*, 333 Pa. Super. 166, 481 A.2d 1358 (1984).

[8] See, e.g. *Reed* v. *Campbell*, ___ U.S. ___ 106 S.Ct. 2234 (1986); *Trimble* v. *Gordon*, 430 U.S. 762 (1977); *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973); *Gomez* v. *Perez*, 409 U.S. 535 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Glona* v. *American Guarantee Co.*, 391 U.S. 73 (1968); *Levy* v. *Louisiana*, 391 U.S. 68 (1968)

barrier to invidiously discriminate against illegitimate children by denying them substantial benefits generally accorded all children," *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973).

Applying these principles to statutes of limitations in paternity actions which circumscribe the child's right to pursue paternal support if he or she has been born out of wedlock, this Court has struck down a one-year statute and a two-year statute of limitations as violative of equal protection in *Mills* v. *Habluetzel*, 456 U.S. 91 (1982), and *Pickett* v. *Brown*, 462 U.S. 1 (1983).[9] The issues presented therein guide the analysis of the case at hand.

A. The State Allows Marital Children At Least Eighteen Years To File For Support, But Limits A Non-Marital Child To Six Years. This Violates Equal Protection And Cannot Be Justified As Necessary To Avoid Stale Claims Because Pennsylvania Permits Paternity To Be Established Without Time Limits In Many Non-Support Contexts Without Concern For Staleness.

In *Mills* v. *Habluetzel*, 456 U.S. 97, 98-99, this Court found a paternity statute of limitations must bear a substantial relationship to the legitimate state interest of avoiding stale and fraudulent claims. And indeed, the Pennsylvania Supreme Court has upheld Pennsylvania's six-year statute of limitations specifically on that ground, stating that "the state has a clear interest in having claims litigated while evidence remains available and fresh," *Astemborski* v. *Susmarski*, 466 A.2d at 1021.

[9] Many state courts both before and after *Mills* and *Pickett* have invalidated their statutes of limitations on equal protection grounds. See, for instance, *Patricia R.* v. *Peter W.*, 120 Misc. 2d 986, 466 N.Y.S.2d 994 (N.Y. Fam. Ct. 1983) (striking down five-year statute); *Alexander* v. *Commonwealth*, 708 S.W.2d 102 (Ky. 1986) (striking down four-year statute); *State Dep't of Health* v. *West*, 378 So. 2d 1220 (Fla. 1979) (same); *Smith* v. *Cornelius*, 665 S.W.2d 182 (Tex. Ct. App. 1984) (same); *Moore* v. *McNamara*, 40 Conn. Supp. 6, 478 A.2d 634 (1984) (striking down three-year statute); *State Dep't of Revenue* v. *Wilson*, 634 P.2d 172 (Mont. 1981) (same); *Lenoir ex rel. Cogdell* v. *Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980) (same); *Callison* v. *Callison*, 687 P.2d 106 (Okla. 1984) (same); *State ex rel. S.M.B.* v. *D.A.P.*, 168 W. Va. 455, 284 S.E.2d 912 (1981) (same).

However, both the unanimous decision of *Pickett* v. *Brown*, *supra*, and the concurring opinion by Justice O'Connor in *Mills* v. *Habluetzel*, *supra*, joined in relevant part by four Members of this Court, indicate that a state's announced motive of warding off stale claims is undermined if that state only limits the time in which paternity adjudications for support of out-of-wedlock children may be brought, yet still permits similar sorts of actions to proceed beyond those limits.

Pennsylvania permits paternity adjudications in many different contexts, but imposes a six-year statute of limitations only where support is sought for a non-marital child. For instance, the intestacy statute, 20 Pa.Cons. Stat. Ann. § 2107(c)(3), allows a court disposing of a decedent's estate to establish that a child born out of wedlock is the child of his father "if there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity." There is no set number of years after which Pennsylvania considers the evidence of birth too tenuous or the likelihood of fraudulent claims too great to permit determinations of paternity under this heirship statute.

One would assume that there are greater dangers of stale or fraudulent claims in cases where paternity is established after a man is dead and cannot testify about events of which he would have special knowledge than

where the man is alive and actively disputing paternity. Moreover, this statute operates in two directions: it permits children whose fathers have died to establish the identity of their fathers; it also allows fathers to claim kinship to deceased children for inheritance purposes.[10]

A father in Pennsylvania may also seek an affirmative judicial determination that he *is* a child's parent at any time, *In Re: Mengel*, 287 Pa. Super. 186, 195, 429 A.2d 1162, 1165 (1981). An unwed father has standing to bring such an action, *inter alia*, in order to preserve his inheritance rights or to contest the adoption of a child found to be his. Furthermore, a father can raise the issue of paternity in a suit to obtain visitation rights or to amend the child's birth certificate, *Id.* at 287 Pa. Super. 195, 429 A.2d 1167. In none of these actions is there a time limit set for the determination of paternity.

Moreover, the putative father of a marital child can deny his paternity as a defense to a support action brought at any time during the child's minority, provided that the putative father is not barred by laches or estoppel, *Commonwealth ex rel. Goldman* v. *Goldman*, 199 Pa. Super. 274, 184 A.2d 351 (1962). In such disputes, paternity can be decided many, many years after the birth of the child. In *Commonwealth ex rel. Gonzales* v. *Andreas*, 245 Pa. Super. 307, 313, 369 A.2d 416, 419 (1976), the Pennsylvania Superior Court specifically criticized the Uniform Act on Blood Tests to Determine Paternity (then

[10] Prior to 1978, 20 P.S. § 2107 provided that a child born out of wedlock would be considered the child of his mother but not his father in heirship proceedings. In the wake of *Trimble* v. *Gordon*, 430 U.S. 762 (1977), which invalidated a similar statute on equal protection grounds, the Pennsylvania probate law was changed to its current version in 1978.

codified at 28 P.S. § 307) because it did not "make any provision for a particular prescriptive period in which a putative father denying paternity must commence suit." When 28 P.S. § 307 was refashioned at 42 Pa. Cons. Stat. Ann. §§ 6131 *et seq.*, the Pennsylvania Legislature again refused to specify a limit on the period of time that a court can order blood tests to determine paternity.[11]

Since Pennsylvania permits paternity determinations without time limits in so many other kinds of cases, it seems absurd for the state to profess that a six-year statute of limitations is somehow necessary to avoid overly stale or false claims only in paternity actions brought by illegitimate children in the support context.[12] The recent passage of the eighteen-year statute of limitations by Pennsylvania is a further acknowledgement that

[11] The case of *Conneil* v. *Connell*, 329 Pa. Super. 1, 477 A.2d 872 (1984) illustrates such a situation. Shortly after separation Mrs. Connell sued her husband for support of their three children. Mr. Connell denied paternity and blood tests excluded him as a possible father for the boy Jeffrey. Seven years later, Mrs. Connell sued again for support for Jeffrey. Mr. Connell again denied paternity. More blood tests were performed with different results. After a hearing, the trial court decided the paternity issue against Mr. Connell, only two months before Jeffrey's twelfth birthday. The Pennsylvania Superior Court affirmed. Thus, because Jeffrey was a marital child, the court considered and decided his paternity, for the *second time*, many years after the time when an out of wedlock child would have been barred from having his father's identity established at all.

[12] In finding § 6704(e) constitutional, the Supreme Court of Pennsylvania ignored all of the above paternity adjudications and focused instead on the fact that in Pennsylvania, other causes of action were not tolled during minority, *Astemborski* v. *Susmarski*, 466 A.2d 1018, 1021 (Pa. 1983). However, in May 1984, 42 Pa.Cons. Stat. Ann. § 5533 was amended so that other causes of action are tolled during minority.

paternity claims are not too old to be tried fairly after six years.

This Court has subjected statutory classifications based on illegitimacy to a "heightened level of scrutiny," *Pickett* v. *Brown*, 462 U.S. at 8. However, even under a rational basis test, this inconsistency, coupled with the historically poor treatment of illegitimate children, certainly suggests that the real purpose of the statute is the impermissible intention to punish children because their parents have not married.

Such inconsistencies have triggered equal protection review of paternity statutes of limitation in other state courts. For instance in *State of Oregon Adult Family Services* v. *Bradley*, 295 Or. 216, 666 P.2d 249 (1983), the Oregon Supreme Court overturned a six-year statute of limitations in paternity actions in part because the state's stated reason for having the limit was undermined by the existence of an heirship statute that allowed the establishment of paternity after the death of the father, no matter how many years had passed since the birth of the child born out of wedlock.[13] This, of course, is a situation parallel to that presented by the Pennsylvania statutes.

B. The Efficacy Of Modern Blood Testing And The Protections Afforded Putative Fathers Remove Problems Of Litigating Delayed Paternity Claims, So That The Six-Year Limit Does Not Bear A Substantial Relationship To The Statutory Purpose Of Avoiding Stale Or Fraudulent Claims.

As this Court has previously concluded, "advances in blood testing have rendered more attenuated the rela-

[13] See also, *In Re: Patricia R.* v. *Peter W.*, 466 N.Y.S.2d 994, 120 Misc.2d 986 (Fam. Ct. 1983), where a five-year statute was invalidated in part because of the disparity between the paternity statute and the statute that tolls other actions during minority, and right of the state Commissioner of Social Services to bring suit within a longer period.

tionship between such statutes of limitations and the exclusion of stale or fraudulent claims. This is an appropriate consideration in determining whether a period of limitations governing paternity actions brought on behalf of illegitimate children is substantially related to a legitimate state interest," *Pickett* v. *Brown*, 462 U.S. at 17-18. In Pennsylvania, blood test results are admissible in a paternity adjudication as "some evidence of paternity" either affirmatively or defensively, *Turek* v. *Hardy*, 312 Pa. Super. 158, 458 A.2d 562 (1983). Both red blood cell and HLA tests are available at the request of a party, *Miller* v. *Kriner*, 341 Pa. Super. 293, 491 A.2d 270 (1985).

Turek v. *Hardy*, *supra* was decided in March 1983, the same year that Cherlyn Clark filed the support complaint for her daughter. Prior to *Turek*, blood tests were only used *before* trial to exclude putative fathers. The *Astemborski* court on remand in December 1983 suggests that once blood tests have failed to exclude "a male from the class of possible fathers, that male must rely on conventional forms of evidence as proof of non-paternity, viz. evidence of lack of access to the mother, as well as his own testimony and the testimony of others," *Astemborski* v. *Susmarski*, 502 Pa. 409, 416, 466 A.2d 1018, 1021. However, after *Turek*, this was no longer the case. Blood test results now can be an important part of a paternity trial. Indeed at a trial, where they do not exclude a man, but exhibit a relatively low probability that he is the father of a child, he will likely introduce the blood test results himself to his benefit.

In the instant case, HLA blood tests were ordered by the trial court. (JA 7-8) The results, which were reported back to the court, did not exclude Mr. Jeter (JA 9) and indeed were alleged to establish a likelihood of paternity of 99.93%. (JA 13) If this case were to go to trial, the

results of the blood tests would be admissible evidence along with other evidence.

As the Supreme Court of Connecticut recently concluded, the accuracy of combined HLA and blood grouping tests has led to similar affirmative use of blood tests as evidence in many jurisdictions precisely because of the ever-increasing precision of these procedures:

> We note that combined blood grouping and HLA testing has attained general acceptance in the scientific community as a means of testing for paternity. The American Medical Association, the American Blood Banking, and the American Association of Histocompatibility have all approved HLA testing to determine paternity. See *Haines* v. *Shanholtz*, 57 Md. App. 92, 100 [468 A.2d 1365] (1984). Moreover, while there is some disagreement among medicolegal commentators as to how inculpatory HLA test results should be presented to the fact finder in paternity cases, nearly all agree that such evidence is reliable and should be admitted in one form or another. *Commonwealth* v. *Beausoleil*, supra, 397 Mass. 215-16, 490 N.E.2d 788. It also appears that the decided trend in other jurisdictions is toward admission of HLA test results as evidence of paternity. See, e.g., *Cramer* v. *Morrison*, 88 Cal. App.3d 873, 153 Cal.Rptr. 865 (1979); *Carlyon* v. *Weeks*, 387 So.2d 465, 467 (Fla.App. 1980); *Crain* v. *Crain*, 104 Idaho 666, 662 P.2d 538 (1983); *Commonwealth* v. *Beausoleil*, supra; *Hennepin County Welfare Board* v. *Ayers*, 304 N.W.2d 879 (Minn. 1981); *Owens* v. *Bell*, 6 Ohio St.3d 46, 53, 451 N.E.2d 241 (1983).

Moore v. *McNamara*, 513 A.2d 660, 668 (Conn. 1986)

The recently developed technique of "DNA fingerprinting" promises to be an even more precise method of determining parentage.[14] This test is already being used for positive paternity identifications in the United Kingdom. See, "Methods and Applications of DNA Fingerprinting: A Guide for the Non-Scientist," Crim. L.R. 105 (1987).

Furthermore, the rights of putative fathers are well protected under Pennsylvania law. First, the defendant putative father has the right to demand a jury trial, 42 Pa. Cons. Stat. Ann., Pa.R.Civ.P. 1910.15(b). At the time of trial, his paternity must be proven by a preponderance of the evidence, 42 Pa. Cons. Stat. Ann., Pa.R.Civ.P. 1910.15(b). He has the right to demand blood tests for himself, the child, and the mother, 42 Pa. Cons. Stat. Ann. §§ 6131 *et seq*. In addition, under Pennsylvania law, paternity cannot be determined against the father on the basis of a default for failure to answer the complaint, 42 Pa. Cons. Stat. Ann., Pa.R.Civ.P. 1910.7. If he cannot afford the costs of blood tests, the state will pay, 42 Pa.Cons. Stat. Ann. § 6131 *et. seq.*; *Little* v. *Streater*, 452 U.S. 1 (1981). Once evidence of the results of the blood tests is admitted and he is excluded as a potential father, the case against him will be immediately dismissed, 42 Pa. Cons. Stat. Ann. §§ 6131 *et seq*.

The indigent putative father also has a right to counsel during the paternity action, *Corra* v. *Coll*, 305 Pa. Super. 179, 451 A.2d 480 (1982). A non-indigent putative father also must be given a reasonable opportunity to secure

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[14] News Notes, 13 Family Law Reporter 1567 (September 22, 1987). The high degree of accuracy of this test derives from matching genetic material obtained from blood or other body fluids. Because it is in that sense a "blood test," it should be available in paternity litigation under the Uniform Act on Blood Tests to Establish Paternity, 42 Pa. Cons. Stat. Ann. §§ 6131 *et. seq*. Cf. *Miller* v. *Kriner*, 341 Pa. Super. 293, 491 A.2d 270 (1985).

counsel for a paternity trial. The putative father also has the right to challenge the court finding on the basis of ineffective counsel, *Banks* v. *Randle*, 337 Pa. Super. 197, 486 A.2d 974 (1984). These procedural safeguards ensure that the putative father, once accused, will get a fair trial and thereby decrease his vulnerability to fraudulent claims.

C. The Six-Year Period Does Not Provide A Reasonable Opportunity For A Paternity/Support Suit To Be Brought For Non-Marital Children, While Marital Children Are Permitted To Bring Suit Throughout Their Minority. This Violates Equal Protection.

This Court has articulated a second requirement for statutes of limitation in paternity actions for children born out of wedlock—that "the period for obtaining paternal support has to be long enough to provide a reasonable opportunity for those with an interest in illegitimate children to bring suit on their behalf. . . ." *Pickett* v. *Brown*, 462 U.S. at 9; *Mills* v. *Habluetzel*, 456 U.S. at 99. Although the time period permitted by Pennsylvania is longer than that of the statutes struck down in *Mills* and *Pickett*, in important ways it is more restrictive because it permits *only* the person with custody of the child or an agency responsible for maintenance of the child to bring the action.[15] The Texas statute invalidated in *Mills* per-

[15] Prior to 1982, 42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1982) provided: "*Moving party.* A complaint may be filed by any person, including a minor spouse, to whom a duty of support is owing. It shall be filed on behalf of a minor child by the person having custody of the minor, without appointment as guardian ad litem. It may also be filed by any public body or public or private agency having any interest in the care, maintenance or assistance of any person to whom a duty of support is owing." This entire provision, almost verbatim, was moved in 1982 to Pa. R.Civ.P. 1910.3, 42 Pa. Cons. Stat. Ann. where it continued the practice under the prior statute.

mitted *any person* with an interest in the well-being of the child to file on his behalf, 456 U.S. at 100. The Tennessee statute struck down in *Pickett* allowed any other person besides the mother to file for the child if the child was on welfare or in danger of being on welfare. Also, this non-parent filer received the benefit of a longer (ten-year) statute of limitations.

The most obvious problem with Pennsylvania's statute is that, practically speaking, it excludes the child from the group of persons who are afforded an opportunity to establish his paternity. A child under six is too young to force his mother to file a complaint or to urge any other agency to act on his behalf. The mother may, for a thousand different reasons of love or fear, indifference or passion, wealth or poverty, neglect or choose not to pursue an action for the child. Her failure to act in the first six years will deprive the child of the support he needs each day of his minority thereafter and will thwart the child's developmental needs to have paternity established.[16] The six-year statute even prevents a later caretaker from establishing paternity afterwards if the mother has failed to do it in the first six years. Thus, limiting the child's rights to her mother's option can have a result which literally becomes an "impenetrable barrier" to the out-of-wedlock child's obtaining of support, where no such obstruction exists for the marital child.

[16] "Emotional and psychological well-being often depend upon a sense of identity and family history derived from the real father. Given the importance of the parent-child relationship to the future psychological and emotional health of the child, it is imperative to establish that relationship with the real father—not just any man capable of providing economic support," Richard Perna, "The Uniform Reciprocal Enforcement of Support Act and the Defense of Non-Paternity: A Functional Analysis," 73 Ky. L.J. 75, at 99 (1984-85).

For example, Cherlyn Clark testified that she was 21 when Tiffany was born. (JA 21) She said that she had been frightened of Gene Jeter's threats and so held off on filing for support for five years, hoping that things could be worked out so that he would help her support the child. (JA 33-34) Finally in August 1978, she decided to pursue support through the Welfare Department. She informed the Welfare Department that she believed Gene Jeter was Tiffany's father. She was referred to a support counselor who took information and filled out forms. (JA 35-36) Two of these forms had blank spaces for "Court Numbers." One of them contained an assignment of her rights against Gene Jeter and authorized the Department to sue him if she didn't. (JA 61-68)

Cherlyn Clark testified that she believed that the Welfare Department would file the suit for her. (JA 36) She kept inquiring of her caseworker during the ensuing years what had happened to her case. (JA 37) She testified that when a new welfare worker finally explained to her that she needed to file a complaint herself in court, she was already long past the statute of limitations. (JA 36-37)

As Justice O'Connor wrote in the concurring opinion in *Mills*, "the practical obstacles to filing suit in this one year after birth could as easily exist several years after the birth of the illegitimate child," 456 U.S. at 105. A mother of a non-marital child may also experience a host of other emotions, mishaps, or disabilities which prevent filing within six-years—as amply illustrated by Cherlyn Clark's story. Furthermore, as Justice O'Connor has also explained,

> The unwillingness of the mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father, or as the Court points out, from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval, may continue years after the child is born . . . . The possibility of the unwillingness to file suit underscores that the mother's and child's interests are not congruent, and illustrates the unreasonableness of the Texas statute of limitations. 456 U.S., at 105 n.4.

It illustrates the unreasonableness of the Pennsylvania statute as well.

D. The Pennsylvania Courts Have Not Given Sufficient Weight To The Countervailing Interests Of The State.

The state has a strong interest in ensuring that genuine claims for support are satisfied as well as in removing children from the welfare rolls. As pointed out by Justice O'Connor in the *Mills* concurring opinion, this interest competes against any interest the state may have in avoiding stale and fraudulent claims, 456 U.S., at 103-104. Tiffany Clark has been supported by public assistance almost since birth. (JA 22-23) If Gene Jeter is her father, the existence of the statute of limitations has undoubtedly discouraged him from contributing to her upkeep or legitimizing her birth because to do so would put him within the exceptions to 42 Pa.Cons. Stat. Ann. §6704(b) and make him liable for continuing support. Thus, while §6704 discourages fathers from voluntary acts of parenting, it also shields them from orders to pay support by the premature snuffing out of the child's opportunity to press her rights. This, of course, may force the child onto welfare, which thwarts the fiscal interests of the state.

The Pennsylvania Superior Court in *Clark* v. *Jeter* was attentive to these considerations, yet held itself reluctantly bound by the decision of the Pennsylvania Supreme Court in *Astemborski* v. *Susmarski*, 502 Pa. 409, 466 A.2d 1018 (1983). The Pennsylvania Supreme Court in

Astemborski totally ignored all these issues. Like the unwise man in the Bible who "strained at a gnat but swallowed a camel," the Pennsylvania Supreme Court has been so concerned with the hypothetical injustice of successful stale claims that it has forgotten the real needs of the children who eat and grow, and the tangible tax burden created by maintaining children on welfare who could better be supported by their fathers.

The judgment of the Pennsylvania Superior Court should be reversed on equal protection grounds, insofar as it upholds the constitutionality of the six-year statute of limitations contained in 42 Pa. Cons. Stat. Ann. § 6704.

III. A STATUTE WHICH LIMITS THE TIME IN WHICH CUSTODIANS OF ILLEGITIMATE MINOR CHILDREN MAY SUE THE CHILDREN'S FATHERS FOR SUPPORT, WHILE BARRING THE MINOR CHILDREN FROM SUING ON THEIR OWN FOR SUCH SUPPORT, DEPRIVES THOSE MINOR CHILDREN OF THE DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In addition to its equal protection infirmity, Pennsylvania's six-year statute of limitations deprives minor children such as Tiffany Clark of their rights to seek and obtain the paternal financial support to which they are entitled contrary to the due process clause of the Fourteenth Amendment.

Pennsylvania's well-settled statutory and common law establishes that the minor children of Pennsylvania born both in and out of wedlock are owed an ongoing duty of support from their parents, throughout their minority, *Commonwealth* v. *Staub*, 461 Pa. 486, 337 A.2d 258 (1975); *Conway* v. *Dana*, 456 Pa. 536, 318 A.2d 324 (1974); *Commonwealth* v. *Dillworth*, 431 Pa. 479, 246 A.2d 859, 867 (1968) (Musmanno, Jr., dissenting):

> . . . the Common Law, as it gradually emerged from the cruelties, superstitions and illogicalities of medieval customs . . . decided to impose a financial responsibility on the bastard father . . . The child born in a house which did not display on its walls a framed marriage certificate had the right to demand that he be supported by the man responsible for his being brought into that house. This was a civil right, a natural right. . .

See also, *Gomez* v. *Perez*, 409 U.S. 535 (1973).

Despite an illegitimate child's legal entitlement to receive this paternal financial support for eighteen years, however, 42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1985) provides that the legal action to obtain it from the father must be commenced within six years of the birth of the out-of-wedlock child, or within two years of the putative father's last voluntary support. Moreover, Pennsylvania law requires that such lawsuit must be initiated, not by the minor child, but by either the person having custody of the child or an agency charged with caring for the child, 42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1982), repealed in 1982 but practice continued by Pa.R.Civ.P. 1910.3: "An Action shall be brought . . . (2) on behalf of a minor child by a person having custody of the minor, without appointment as guardian ad litem or (3) by a public body or public or private agency having an interest in the care, maintenance or assistance of a person to whom a duty of support is owing. . ."

Thus, although a minor child born out of wedlock possesses an independent right to paternal support, Pennsylvania law affords exclusive control to exercise or not to exercise the child's right to seek such support to the child's custodian or to an agency responsible for caring for such a

child.[17] Consequently, in cases such as that now before this Honorable Court, the custodial parent's failure to initiate a support action within the time prescribed by the challenged statute of limitations serves to foreclose forever the minor child's right to receive the continuing financial support which the father is legally obligated to provide. Such a result offends due process because it untenably divests the minor child affected in this case of her substantive entitlement to paternal support, without affording a meaningful opportunity to be heard, *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971).

This Court has frequently stressed the importance of familial bonds, both marital and otherwise. See *Stanley* v. *Illinois*, 405 U.S. 645 (1972). Furthermore, it has recognized that "both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination," *Little* v. *Streater*, 452 U.S. 1, 13 (1981). The risk that this interest will be erroneously denied is enormous where the child does not even have a right to come to court on his own to press his interest.

Finally, the state itself shares the interest of the child and the defendant in an accurate and just determination of paternity, *Little* v. *Streater*, 452 U.S. 1, 14. This interest is

[17] Although the Department of Public Welfare theoretically could initiate child support proceedings under this provision, the facts of Cherlyn Clark's case show how ineffective this provision is to protect the child's rights. This is especially true since the Department of Public Welfare must depend entirely upon the cooperation of the mother to identify the putative father and to participate in blood tests, trials, and other proceedings to establish paternity. If the mother is unwilling or unable to cooperate, any agency attempts to establish paternity will be easily thwarted. And, of course, the child who is not on welfare and is not being cared for by an agency will get no help whatsoever in protecting his rights through this provision.

in no way served by excluding the child from those able to bring a paternity action and by foreclosing his right to obtain support because of the failure of his custodian to file suit before he turns six. Moreover, the six-year statute is not necessary administratively to prevent stale or fraudulent claims. See Argument, Part II, *infra*.

Thus, the assessment of the interests of the private parties involved, the risk of erroneous deprivation of these interests through the Pennsylvania procedures used to determine paternity, and an analysis of the government's interests lead to the conclusion that due process is denied by shutting children out of available procedures to establish paternity and foreclosing their right to support because of their custodians' failures to bring suit within six years of birth. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

The Pennsylvania Superior Court's rejection of the Petitioner's due process challenge to the constitutionality of 42 Pa. Cons. Stat. Ann. § 6704(b) conflicts with the conclusions of the courts of many other jurisdictions. Numerous states have recognized that a minor child's independent rights to obtain paternal support may not, under the Due Process Clause, be constitutionally foreclosed by a statute of limitations which truncates the custodial parent's right to initiate such a support action on behalf of the child.

For example, in finding a similar statute of limitations unconstitutional as violative of a minor child's due process guarantees, the Texas Court of Civil Appeals, in *In Re: Miller*, 605 S.W. 2d 332 (Tex. Civ. App. 1980), *aff'd on other grounds sub nom. In Re J.A.M.*, 631 S.W.2d 730 (Tex. 1982), stated at 336:

> . . . To hold otherwise would allow the illegitimate's right to support to be waived by the mother.

> Not only would this result in unequal protection under the law . . . but *such a denial would violate the illegitimate's constitutional rights to due process* . . . the law does not permit one to forfeit another's rights. *The rights of an illegitimate child to assert a claim for patental support is too fundamental to permit its forfeiture by the mother's failure to timely institute a filiation proceeding.* (emphasis added)

Likewise, in *State Dept. of Revenue* v. *Wilson*, 634 P.2d 172 (Mont. 1981), the Supreme Court of Montana held that a three-year statute of limitations as applied to prevent an illegitimate child, through a guardian, guardian ad litem, or next friend, from seeking paternal support would unconstitutionally deny the child due process, "The rights of the child cannot be so compromised during its infancy. The child born out of wedlock cannot be barred access to our courts during infancy," 634 P.2d at 174.

In a number of jurisdictions, minor children born out of wedlock have been held to possess a common law right of action separate from, and longer than, that statutorily afforded to the children's custodian—precisely to avoid the due process problems raised in the instant case. See *Spada* v. *Pauley*, 149 Mich. App. 196, 385 N.W.2d 746, *aff'd mem.*, 425 Mich. 1203, 389 N.W.2d 85 (1986):

> . . . we believe that Michigan's statutory scheme, which [due to the limitations period] denies the present plaintiff a cause of action, unreasonably restricts an illegitimate child's right to obtain parental support. Therefore, an illegitimate child may maintain an independent cause of action.

See also, *Bertie-Hertford Child Support Enforcement Agency ex rel. Souza* v. *Barnes*, 80 N.C. App. 552, 342 S.E.2d 579 (1986); *Payne* v. *Prince George's County Dept. of Social Services*, 67 Md. App. 327, 507 A.2d 641 (1986); *Nettles* v. *Beckley*, 32 Wash. App. 606, 648 P.2d 508 (1982); *Johnson* v. *Norman*, 66 Ohio St.2d 186, 421 N.E.2d 124

(1981); *Dozier* v. *Veasley*, 272 Ark. 210, 613 S.W.2d 93 (1981); *Kaur* v. *Singh Chawla*, 11 Wash. App. 362, 522 P.2d 1198 (1974); *Huss* v. *DeMott*, 215 Kan. 450, 524 P.2d 743 (1974); *Department of Economic Sec.* v. *Shanklin*, 514 S.W.2d 682 (Ky. 1974); *Commonwealth* v. *Mondano*, 352 Mass. 260, 225 N.E.2d 318 (1967); *In Re R.W.L.: W.R.W.* v. *Bartholomew*, 116 Wis. 2d 150, 341 N.W.2d 682, 687 (1984):

> . . . we also erred in holding . . . that the . . . statutory procedure is the child's exclusive remedy for establishing paternity and constitutes a bar to the child's obtaining a judicial forum in his or her own right on the paternity issue. *Such an interpretation renders the . . . statutory procedure unconstitutional . . . because it did not afford the child 'a day in court' to litigate a legislatively recognized right.* (emphasis added)

In other jurisdictions, some paternity/support statutes of limitations shorter than that at issue in the instant case have been upheld because they barred *only* the rights of the adult—not the rights of the minor child—to file suit beyond the statutory limit; *e.g.*, *Doak* v. *Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984), where the Nebraska Supreme Court, on that basis alone, held that a four-year statute of limitations did not constitutionally intrude upon the minor child's due process rights.

Moreover, since this Honorable Court's ruling in *Gomez* v. *Perez*, 409 U.S. 535 (1973), a growing majority of states have enacted civil paternity statutes which either prescribed no time limit at all to any cause of action to establish paternity,[18] or, while applying the pertinent

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[18] As of 1983, seven of the forty-four states which had enacted civil paternity statutes chose not to prescribe a limitations period for filing the action. Moreover, none of the six states which continued to rely,

limitations period to the mother's cause of action, expressly precluded its application to the child's cause of action.[19] The foregoing modifications of state law and the conclusions reached by the courts in the above-cited, and numerous other jurisdictions, reflect the "developing consensus at the state and federal levels, i.e., that the right of a child, legitimate or illegitimate, to be supported by his natural father lies in the child and an action therefor need not be brought by some intermediary party acting on his behalf—a party, that is, whose interest might conflict with that of the child," *Williams* v. *Alabama*, 504 So.2d 282, 283 (Ala. App. 1986), *cert. denied*, No. 85-1427 (Ala. 1987).[20]

As several state courts aptly have recognized, a mother's interests in initiating a paternity/support action

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instead, on criminal non-support statutes to determine paternity of out-of-wedlock children, provided for a statute of limitations pursuant to those laws. Wells, C., *Statutes of Limitations in Paternity Proceedings: Barring An "Illegitimate's" Right to Support*, 32 Amer. U.L.R. 567, 577 (1983).

[19] As of July 1985, at least twenty-seven state civil paternity statutes had either specifically excepted the minor child's own cause of action from the statute of limitations incorporated within those laws, or allowed for eighteen-year limitations periods. *Op. cit.*, 577, 578. See, also, *Record of Passage of Uniform Acts (Uniform Parentage Act)*, Am. Jur. 2d Desk Book, Item No. 124. "State Legislation on Child Support and Paternity," Tenn. B. J., Jan/Feb 1986, 20-21.

[20] See also, the Uniform Parentage Act, § 7, 9B U.L.A., which, while limiting the rights of anyone other than the out-of-wedlock child to bring a paternity action within three years of the child's birth, allows an action "brought by or on behalf of [the] child" to be brought until three years after the child reaches the age of majority. As of 1987, sixteen states had adopted, or substantially adopted, this Act, *Record of Passage of Uniform Acts (Uniform Parentage Act)*, Am. Jur.2d Desk Book, Item No. 124.

are neither necessarily identical to the illegitimate child's interests, nor are they likely to be sufficiently similar to afford the child a forum to protect his or her independent interests, *Spada* v. *Pauley*, 385 N.W.2d at 750; *In Re R.W.L.*, 341 N.W.2d at 686; *Johnson* v. *Norman*, 421 N.E.2d at 127.

A mother may fail to commence timely paternity proceedings for a variety of reasons: she may have a continuing relation with or affection for the father; she may wish to avoid any contact with the father; she may wish to avoid the disapproval of her family or community; she may be able to support the child and not foresee a change in her circumstances; she may be subject to the emotional strain and confusion that often attend the birth of an illegitimate child and continue for a prolonged period, *Pickett* v. *Brown*, 462 U.S. at 12-13; *Mills* v. *Habluetzel*, 456 U.S. at 105-106 (O'Connor, J., concurring); *Spada*, *loc. cit.*; *In re R.W.L.*, *loc. cit.*

In contrast, it is difficult to hypothesize a situation where a minor child would not have a substantial interest in seeking and obtaining, to the extent possible, paternal financial support for the child's healthy and happy upbringing, education, and training. *Cf.*, *Kaur* v. *Singh*, 522 P.2d at 1198 n.1, "When minor children are involved, the state's interest is that, in so far as is possible, provision shall be made for their support, education, and training, to the end that they may grow up to be worthy and useful citizens (citation omitted)."

Moreover, "[a] child's interests [in paternity/support] litigation are much broader," than those of the mother, *Spada* v. *Pauley*, 385 N.W.2d at 750, because the exercise of those rights, or the failure to do so, might not only additionally affect a child's future rights to Social Security

benefits and inheritances, but a child's sense of self-identity, heritage, and esteem. Cf., Note 16, *supra*.

Finally, there can be no quarrel that a father's duty to provide child support, under Pennsylvania law, is ongoing and continuous throughout the child's minority, *Commonwealth* v. *Staub*, 461 Pa. 486, 337 A.2d 258 (1975); *Commonwealth* v. *Dana*, 456 Pa. 536, 318 A.2d 324 (1974). Thus, a father's breach of that duty must likewise be deemed ongoing and continuing in nature, *M.A.D.* v. *P.R.*, 277 N.W.2d 27 (Minn. 1979), so that each day that the father fails to support his child, a new cause of action arises. See, *South Carolina Dept. of Social Services* v. *Lowman*, 269 S.C. 41, 236 S.E.2d 194, 196 (1977) ("New causes of action arise over the years with each instance of a putative father's failure to support his child"); *State Dept. of Health and Rehabilitative Services* v. *West*, 378 So.2d 1220, 1228 (Fla. 1979) (". . . since the duty of support continues throughout the minority of the child, new causes of action are being created each day that the natural father does not provide support.")

Pennsylvania law and the Pennsylvania courts have nevertheless persisted in foreclosing to out-of-wedlock children all opportunity to seek and obtain the ongoing paternal support to which they are entitled. The state has deprived those children of any access to the legal process available and necessary in order to secure their rights if, for whatever reasons entirely beyond the children's capacity to control, their mothers have failed to commence a paternity/support action within six years.

Thus, the Pennsylvania's six-year statute of limitations "operates to deprive [a minor child such as Tiffany Clark] of a protected right although its general validity as a measure enacted in the legitimate exercise of state power

is beyond question," *Boddie* v. *Connecticut*, 401 U.S. at 379, because ". . . it operates to foreclose [her] opportunity to be heard," *Id.*, at 380; *Little* v. *Streater*, 452 U.S. at 17. Surely, such an outcome utterly fails to satisfy "the requirement of fundamental fairness expressed by the Due Process Clause (citations omitted)," *Little* v. *Streater*, *loc. cit.*

Insofar as 42 Pa. Cons. Stat. Ann. § 6704(b) compels such a constitutionally unacceptable result, that portion of the Pennsylvania Support Proceedings Act must be held unconstitutional.

CONCLUSION

For all the foregoing reasons, the judgment of the Superior Court of Pennsylvania, which affirmed the trial court's dismissal of the Petitioner's complaint for support, should be reversed, and the case remanded for further proceedings consistent with the decision of this Court.

Respectfull submitted,

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ADDENDUM

ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 666(a) and § 666(a)(5):

> 42 U.S.C. § 666. *Requirement of statutorily prescribed procedures to improve the effectiveness of child support enforcement*
>
> a) Type of procedures required:
>
> In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with the regulations of the Secretary, to increase the efiectiveness of the program which the State administers under this part:
>
> * * *
>
> (5) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

23 Pa. Cons. Stat. Ann. § 4343(b) (Purdon Supp. 1987):

> (b) *Limitation of actions*—An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1985) (repealed):

> (b) *Limitation of actions*—All actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action or proceeding may be commenced at any time within two years of such contribution or acknowledgement by the reputed father.

42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1982) (repealed):

> *Moving Party.* A complaint may be filed by any person, including a minor spouse, to whom a duty of support is owing. It shall be filed on behalf of a minor child by the person having custody of the minor, without appointment as guardian ad litem. It may also be filed by any public body or public or private agency having any interest in the care, maintenance or assistance of any person to whom a duty of support is owing.

42 Pa. Cons. Stat. Ann. § 6704(e) (Purdon Supp. 1980) (repealed):

> (e) *Limitation of actions*—All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father.

42 Pa. Cons. Stat. Ann., Pa.R.Civ.P. 1910.7:

> *No Pleading by Defendant Required. Question of Jurisdiction or Venue or Statute of Limitations in Paternity*
>
> (a) No pleading by the defendant shall be required, but if defendant elects to file a pleading, the domestic relations office conference required by the order of court shall not be delayed.
>
> (b) If defendant raises a question of jurisdiction or venue or in paternity cases the defense of the statute of limitations, the court shall promptly dispose of the question and may, in an appropriate case, stay the domestic relations office conference.

42 Pa. Cons. Stat. Ann., Pa.R.Civ.P. 1910.15:

> *Paternity*
>
> (a) If the action seeks support for a child born out of wedlock and the reputed father is named as defendant, the defendant may acknowledge paternity in a verified writing substantially in the form provided by Rule 1910.28(a). In that event the action shall proceed as in other actions for support.
>
> (b) If the reputed father does not execute an acknowledgment of paternity, the domestic relations officer shall terminate the conference. He shall advise the parties that there will be a trial without jury on the issue of paternity unless within ten days after the conference either party demands a trial by jury as provided by Rule 1910.28(b).
>
> *NOTE:* See § 6131 of the Judicial Code, 42 Pa.C.S. § 6131 et seq. for the Uniform Act on Blood Tests to Determine Paternity

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 01195 Philadelphia 1987

JOYCE YOUNG, *Appellant*
v.
HAROLD E. HAMPTON, *Appellee*

Appeal from the Order entered March 18, 1987 in the Court of Common Pleas of Northhampton County, Civil No. D.R. 128286

FILED JAN 27 1988

BEFORE: MCEWEN, MONTEMURO and KELLY, JJ.

MEMORANDUM:

This appeal has been taken from an order which dismissed a paternity action instituted by appellant on the ground that the action was time barred. Application of the relevant law to the facts of this case establishes that the learned Judge Richard D. Grifo properly dismissed the action. We, therefore, affirm.

On November 20, 1982, appellant commenced a paternity action against appellee seeking child support for her two minor children, 42 Pa.C.S. §6701 *et. seq.*.[1] Appellant alleged that appellee was the father of her son Davin, born on February 23, 1975, and her daughter Kiara, born on August 2, 1976. Appellee filed preliminary objections to appellant's petition asserting that the action was time barred by the six year statute of limitations, 42 Pa.C.S. §6704(e). The hearing court entered an order which sustained appellee's preliminary objections and dismissed appellant's complaint after concluding

[1]Repealed, October 30, 1985, P.L. 264, No. 66, §3, effective in 90 days.

that, since appellant had failed to commence the action within six years of the birth of either child, the action was time barred.

Subsequently, the Pennsylvania legislature enlarged the six year limitations period in which a paternity action could be commenced to eighteen years, effective January 28, 1986. *See:* Pa.C.S. §4343(e).[2] Passage of the new statute of limitations prompted appellant to initiate a subsequent action in paternity[3] against appellee on August 4, 1986, seeking a prospective order for child support. The hearing court determined, however, that this action was also barred as a result of the expiration of the previously applicable six year statute of limitations and, therefore, dismissed appellant's complaint. This timely appeal followed.

Appellant contends that it was error for the hearing court to dismiss her complaint, asserting that the new eighteen year statute of limitations permits her to pursue an action for paternity against appellee on behalf of her son until February 23, 1993, and on behalf of her daughter until August 2, 1994, and, therefore, her complaint, which was filed on August 4, 1986, was timely. We are constrained to reject this assertion as meritless as the distinguished Judge Richard D. Griffo properly determined that the decision of this Court in *Clark* v. *Jeter*,

[2]The eighteen year statute of limitations was enacted by our legislature in response to the Federal Child Support Enforcement Act of 1984, 42 U.S.C. §666, which requires states to adopt procedures which permit the establishment of paternity of any child at any time prior to the child's 18th birthday. *See:* 42 U.S.C. §1666(a)(5).

[3]This action was commenced pursuant to 23 Pa.C.S. §14343.

358 Pa.Super. 550, 518 A.2d 276 (1986) *allocatur denied* ___ Pa. ___, 527 A.2d 533 (1987) is controlling.

Accordingly, the order entered March 18, 1987, is affirmed.[4]

Order affirmed.

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[4]However difficult it may be to reconcile the holding of *Clark* v. *Jeter*, supra, with language contained in *Paulussen* v. *Herion*, 359 Pa. Super. 520, ___, 519 A.2d 473, 475 (1986), *Commonwealth ex rel. Pugh* v. *Callahan*, 312 Pa.Super. 246, and n.5, 458 A.2d 607, 609 and n.5 (1983), and *Williams* v. *Wolfe*, 297 Pa.Super. 270, ___, 443 A.2d 831, 835 (1982), it is clear that *Clark* v. *Jeter*, supra, sets forth the law of this Commonwealth.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 01195 Philadelphia 1987

JOYCE YOUNG, *Appellant*
v.
HAROLD E. HAMPTON, *Appellee*

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Northampton County be, and the same is hereby Affirmed.

BY THE COURT:

/s/ _____
Prothonotary

Dated January 27, 1988